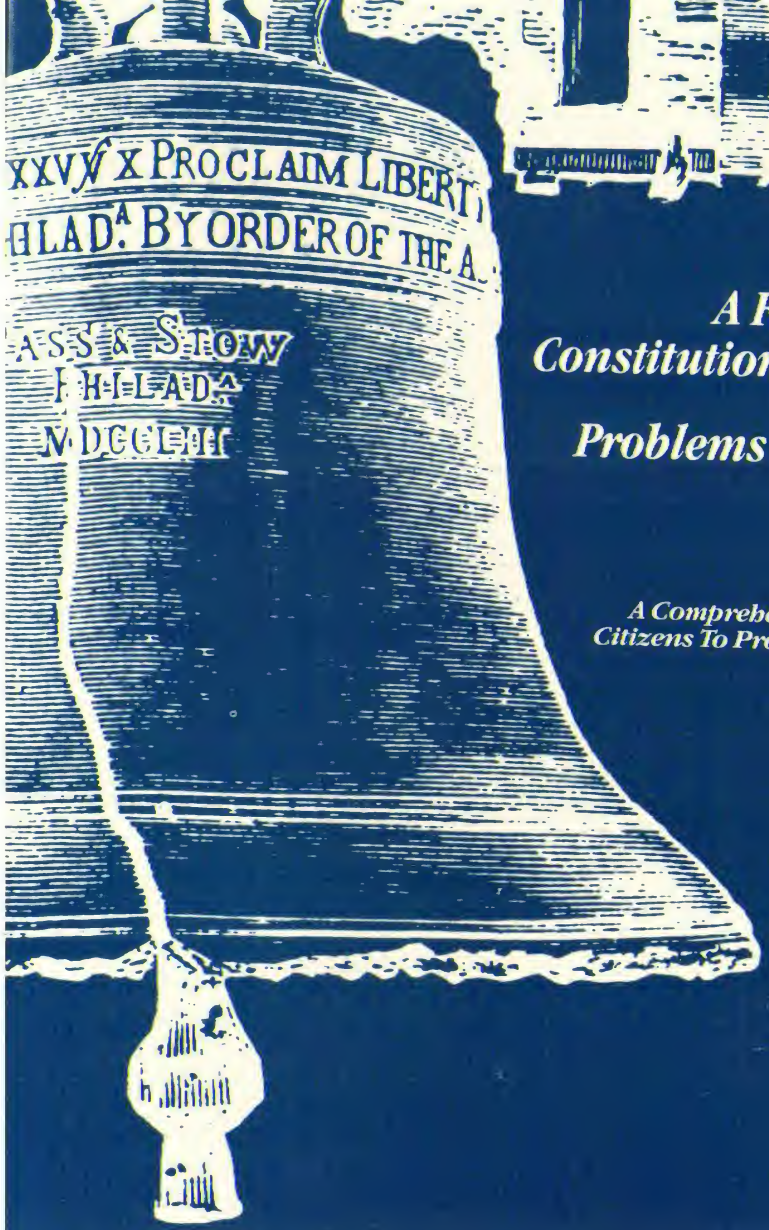


A Federal Constitutional Conventi

Problems & Precedents

A Comprehensive Study By The Citizens To Protect The Constitution

". . . having witnessed the difficulties and dangers experienced by the first Convention, which assembled under every propitious circumstance, I would tremble for the result of a Second."
—James Madison

Citizens To Protect The Constitution

1900 L Street, N.W.
Suite 610
Washington, D.C. 20036

(202) 785-2936

CITIZENS TO PROTECT THE CONSTITUTION

BOARD OF ADVISORS

The Honorable Gardner Ackley, *Professor of Economics, University of Michigan;* The Honorable Toney Anaya, *Governor of New Mexico;* The Honorable Tom Bradley, *Mayor, City of Los Angeles;* The Honorable Harold Brown, *Former Secretary of Defense of the United States;* The Honorable Jimmy Carter, *Former President of the United States;* The Honorable John T. Dunlop, *Former Secretary of Labor of the United States;* The Honorable Arthur J. Goldberg, *Former Supreme Court Justice of the United States;* The Honorable Walter W. Heller, *Former Chairman of the President's Council of Economic Advisors;* The Right Reverend Theodore Hesburg, *President, University of Notre Dame;* The Honorable Barbara Jordan, *Professor, Lyndon Baines Johnson School of Public Affairs;* Lane Kirkland, *President, AFL-CIO;* The Honorable Melvin R Laird, *Senior Counsellor, Readers Digest Association, In and Former Secretary of Defense of the United State* James Michener, *Author;* The Honorable Alice Rivli *Former Director of the Congressional Budget Office;* Feli Rohatyn, *Senior Partner, Lazard Freres and Compan* The Honorable William Donald Schaefer, *Mayor, City Baltimore;* The Honorable Richard Snelling, *Governor Vermont;* The Honorable Elmer B. Staats, *Former Com troller General of the United States;* The Honorable Jam Tobin, *Nobel Laureate in Economics;* Laurence H. Trib *Harvard School of Law;* The Honorable Cyrus B. Vanc *Former Secretary of State of the United States.*

MEMBER ORGANIZATIONS AND INDIVIDUALS

John Shattuck, *National Legislative Director, American Civil Liberties Union;* Albert Shanker, *President, American Federatio of Teachers;* Dr. Donald Feldstein, *Executive Vice President, American Jewish Committee;* Howard M. Squadron, *Presider American Jewish Congress;* Alfred D. Sumberg, *Director of Govt. Relations, American Association of University Professo* Mary Purcell, *President, American Association of University Women;* LaDonna Harris, *Americans for Indian Opportuni* Edd Doerr, *Executive Director, Americans for Religious Liberty;* W. Melvin Adams, *Americans United for Separation Church and State;* Gerald W. McEntee, *President, American Federation of State, County and Municipal Employees;* D Daniel Thurz, *Executive Vice President, B'nai B'rith International;* Dorothy Binstock, *President, B'nai B'rith Women;* Jam M. Dunn, *Executive Director, Baptist Joint Committee on Public Affairs;* Pablo Eisenberg, *President, Center for Commun Change;* Glenn E. Watts, *President, Communications Workers of America;* Stephen Brobeck, *Executive Director, Consum Federation of America;* Norman Cousins, *Editor and Author;* Haviland C. Houston, *General Secretary, General Board Church and Society, United Methodist Church;* Dr. Gary M. Ross, *General Conference of Seventh-Day Adventists;* Rev. William Howard; William Abernathy, *Harvard Business School;* Eileen Rockefeller Growald, *President, Institute for t Advancement of Health;* William Winpisinger, *President, International Association of Machinists and Aerospace Worke* Sol C. Chaikin, *President, International Ladies' Garment Workers Union;* Ralph Neas, *Executive Director, Leadersh Conference on Civil Rights;* Dr. Charles Bergstrom, *Executive Director, Lutheran Council, U.S.A.;* James A. Autry, *V President, Meredith Corporation;* Benjamin L. Hooks, *Executive Director, National Association for the Advancement Colored People (NAACP);* Vincent R. Sombrotto, *President, National Association of Letter Carriers;* Dennis W. Arch *President, National Bar Association;* Rev. Thomas J. Harvey, *Executive Director, National Conference of Catholic Charitie* Barbara Warden, *Executive Director, National Consumers League;* Barbara Mandel, *President, National Council of Jew Women;* Raul Yzaguirre, *President, National Council of LaRaza;* Dorothy I. Height, *National President, National Council Negro Women;* Jacob Clayman, *President, National Council of Senior Citizens;* Mary Hatwood Futrell, *President, Nation Education Association;* George W. Stone, *President, National Farmers Union;* Polly Madenwald, *President, Nation Federation of Business and Professional Women's Clubs, Inc.;* Mary Jean Collins, *Action Vice-President, National Organiz tion for Women;* John E. Jacob, *President, National Urban League;* Kathy Wilson, *Chair, National Women's Politi Caucus;* Anthony T. Podesta, *Executive Director, People for the American Way;* Harris Gilbert, *Chairman, Social Acti Committee for the Union of American Hebrew Congregations;* David Cohen, *President, Social Development Corporati* Rabbi Alexander Schindler, *President, Union of American Hebrew Congregations;* Owen Bieber, *President, United Au Workers;* Dr. Yvonne Delk, *Executive Director of Church and Society, United Church of Christ;* Richard L. Trumka, *Preside United Mine Workers;* Marjorie Craig Benton, *United States Representative to UNICEF;* Katherine Ozer, *Legislative Direct United States Student Association;* Lynn R. Williams, *Acting President, United Steel Workers of America.*

PANEL OF LEGAL SCHOLARS

T. Alexander Aleinikoff, *University of Michigan Law School;* Florian Bartosic, *Dean, University of California at Dav School of Law;* C. Christopher Brown, *University of Maryland, School of Law;* Neil H. Cogan, *Southern Method University School of Law;* Walter E. Dellinger, *Duke University School of Law;* Thomas I. Emerson, *Yale Law Schoo* Jefferson B. Fordham, *University of Utah, College of Law;* Gerald Gunther, *Stanford Law School;* Betsy Levin, *Dea University of Colorado, School of Law;* Arval A. Morris, *University of Washington, School of Law;* Terrance Sandalo *Dean University of Michigan Law School;* Robert L. Schwartz, *University of New Mexico, School of Law;* Laurence H. Trib *Harvard University Law School.*

Executive Director: Linda Rogers-Kingsbury
Counsel: Kevin O. Faley

TABLE OF CONTENTS

FOREW

Citizens To Protect The Constitution ("Citizens") is a private, nonpartisan, nonprofit organization formed to protect the Constitution of the United States. In particular, the individuals and organizations which have come together to form *Citizens* have become increasingly concerned over the dangerous and uncharted course on which this Nation will embark if a Federal Convention is convened for the ostensible purpose of drafting a balanced budget amendment to the United States Constitution. While some members of *Citizens* may differ on the need for, or desirability of, a balanced budget amendment, all agree that a Constitutional Convention should be convened only under the most extreme circumstances. This most drastic of all measures should be taken only when there is a broad-based national consensus that our traditional method of resolving important constitutional disputes is not, and will not, work and we therefore require a Convention as the only alternative method available for the resolution of these essential disputes.

In order to more fully explore the many important issues surrounding the question of whether we should convene the second Constitutional Convention in the history of this Nation, *Citizens To Protect The Constitution* is issuing the following report. *Citizens* wishes to express its gratitude to its Board of Advisors for their invaluable assistance and contribution to this effort. In addition, we wish to thank a panel of legal scholars for their participation in the preparation of this report and permission to include, as an appendix, a sample of their thoughts on this matter.

Citizens To Protect The Constitution wishes to express its appreciation to our chief legal counsel, Kevin O. Faley, Brian W. Fitzgerald, Counselor at Law, and our executive director, Linda Rogers-Kingsbury, for their invaluable assistance in the research, writing and preparation of this Report.

Board of Advisors
Citizens to Protect
The Constitution

INTRODUCTION

Throughout the turbulent, and often violent, histories of the nations of the world the Constitution of the United States stands out as a uniquely successful charter of government. It has provided our country with the political stability necessary for successful governance while, at the same time, allowed sufficient flexibility to enable our political institutions to meet the changing needs of a vigorous and growing society.

In the minds of most Americans, however, the Constitution has become more than a charter of government whose primary function is to parcel out various duties and functions among the executive, legislative and judicial branches. Across almost two centuries the Constitution has evolved into the vehicle through which we protect our individual rights and liberties. There can be no doubt that the final goals of this evolution have not been attained, nor need we pretend that its progress has always proceeded apace. Moreover, this process has witnessed some tragic failures and omissions, not only in the protection of the rights of individuals, but even in the protection of entire groups and classes of our citizens. For the most part, however, our Constitution has been a remarkably successful charter.

The Constitution stands squarelly between individual Americans and their government insuring that the government cannot imprison us without a trial, seize our property without due process of law and just compensation, deny us the right to vote, discriminate against us based on race, creed or national origin, prevent us from speaking our minds or writing our opinions on any matter and to whomever we wish, deny us the right to travel freely or prevent us from practicing whatever religion we desire, or gathering together for any lawful purpose. It is a tribute to the viability and effectiveness of this document that many Americans take for granted that these and many other rights will be effectively protected by the Constitution. Unfortunately, we sometimes lose sight of the fact that on this planet such rights and protections of the individual are not commonplace but are indeed extraordinary. It is our Constitution which, more than any other institution, makes us the rare exception to this rule.

Today that Constitution faces a danger which it has never faced before. Moreover, most Americans are not aware that we are rapidly approaching a constitutional crisis which could very well place this document in jeopardy. Most of us would be surprised, indeed, to learn that we are on the verge of convening the Second Constitutional Convention in the history of the United States.

Under Article V there are two methods of amending the Constitution. The method by which all 26 of the current amendments were adopted was through the process by which Congress submits an amendment to the states for ratification. The second method is for two-thirds of the states to petition Congress to convene a Constitutional Convention. Because of the enormous gravity of such a step, this latter path has never been followed. Indeed, to embark on it now is to enter an area of unanswered and unanswerable questions surrounding both known and as yet unperceived dangers to the very foundation of our government. The Convention process contained in Article V has never been tried and its origins at the Philadelphia Convention of 1787 shed little or no light on the power or authority the Founders intended for such a gathering. Thus, neither history nor practice provides us with any clue as to what such a Convention could legally do or what, if any, existing governmental body could exercise control over it.

Despite the obvious gravity of convening such a Convention it may come as a shock to many Americans to learn that 32 of the requisite number of 34 state legislatures have already forwarded petitions calling for a Constitutional Convention to Congress. While there may be some question as to the actual validity of some of these petitions there can be no doubt that we are inexorably, yet blindly, setting a course into uncharted constitutional waters.

Citizens To Protect The Constitution consists of organizations and individuals which have joined together to call attention to this coming storm and to alert the American people that our Constitution is in danger. For some time a small group who favor an amendment to the Constitution to require a balanced federal budget has been quietly engaged in steering petitions for a Constitutional Convention through state legislatures. The quiet and unobtrusive method by which these petitions have been adopted has obscured the many dangers presented by such a Convention. *Citizens To Protect The Constitution* should emphasize that its members may differ on the need or workability of a balanced budget amendment to the Constitution; it is not only the amendment itself which causes us to raise an alarm. Our concern stems from the serious legal and constitutional dangers as well as the enormous political and social problems which will inevitably confront us upon the convening of a Convention with unknowable authority and uncertain restraints.

Those who have worked to promote these petitions have relied on various assurances to allay concerns as to the wisdom of convening a Constitutional Convention. We are told, for example, that despite the adoption of these petitions a Convention will never be held; that this is simply a method of pressuring Congress to act on a balanced budget amendment to the Constitution. We are assured that even if a Convention is convened there is no danger that it would consider any issues other than that of a balanced federal budget amendment. Moreover, we are assured that if by some chance the Convention does stray from its supposed authorized agenda the Congress and the courts will step in to reign the runaway Convention back to its proper jurisdiction.

It is the purpose of this report to explore the historical and legal strengths of these assurances. The report will briefly examine the history of the First Constitutional Convention held in Philadelphia in 1787. It is important to note that an attempt was made to strictly control that Convention's agenda by both the Continental Congress and the Articles of Confederation, which was at that time the prevailing charter of government. Those attempts to control the Convention failed. Section II of the report will review the history of the adoption of Article V itself at the Philadelphia Convention to determine if the attending discussions and debates can shed some light on the Founders' intent concerning the power and authority of subsequent Constitutional Conventions. Finally, the report will examine specific questions raised by these petitions, such as whether Congress must call a Convention when the requisite number have been received, and to what extent a second Constitutional Convention can be controlled by the state legislatures or by the Congress itself.

It is the hope of *Citizens To Protect The Constitution* that through this Report decisions made concerning the adoption of petitions to convene a Constitutional Convention will be informed decisions. There can be no doubt that, short of a declaration of war, the convening of a Constitutional Convention is the most solemn act this government can undertake. Decisions to pursue this course should be made with full cognizance of the many uncertainties and dangers which will inevitably arise.

THE FIRST CONSTITUTIO CONVENTION

Some years after our new Nation had won its independence from Great Britain, the form of government then existing under the Articles of Confederation came under increasing criticism. It was evident to many that the Articles of Confederation was proving to be inadequate to meet the requirements of a growing nation. Suggestions were made that the confederation form of government was altogether too loose to serve the proper aims of government. Perhaps the most pervasive concern was the demonstrated incapacity of the Continental Congress to properly manage the commercial affairs of the thirteen states.[1]

For some time, two of the States, Maryland and Virginia, had been engaged in a strenuous quarrel over navigation rights on the Potomac River. In the early spring of 1785, their respective legislatures sent commissioners to Alexandria, Virginia, for a discussion of the subject. After eight days of meetings, some agreements were reached on the complicated matters involved in the common use of the Potomac waters.[2] However, the most important outcome of what has become known as the "Mount Vernon Conference" was the decision that the delegates from Virginia and Maryland should meet annually "for keeping up harmony in the commercial relations between the two states."[3]

While ratifying the commissioners' report from the Mount Vernon Conference, the Maryland Legislature voted to also invite to the annual meeting representatives from Delaware and Pennsylvania. Virgina thereupon proposed a conference of all the states "to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony." This call led to the Annapolis Convention in September, 1786.[4]

Although all thirteen states had been invited to the Annapolis Convention, only five states attended – too few to take any decisive action. The principal accomplishment of this convention was that it recommended to the Continental Congress that all thirteen states appoint delegates to a convention to be held in Philadelphia "on the second of May next, to take into consideration the trade and commerce of the United States."[5] Thus by 1786 concern over the commercial relationships among the States under the Articles of Confederation had resulted in specific calls by several states for some modification of that document as it pertained to matters of commerce and trade.

The Annapolis Convention's recommendation was laid before Congress on September 20, 1786, and referred to committee for further study. Five months later the committee adopted a report, by a majority of one vote, which stated that the Congress should call a Convention in Philadelphia in May for the purpose of devising "such further provisions" as shall render the federal government "adequate to the exigencies of the Union."

The committee's report was debated in Congress on February 21, 1787. One of the main contentions of the debate centered around the issue of limiting the authority of the upcoming Convention. Indeed, concern in Congress that the Philadelphia Convention might become a runaway convention led to the adoption of specific limiting language in the Congressional resolution calling for the Convention. That resolu-

tion stated that a convention of delegates should meet in Philadelphia on May 14, 1787,

> *"for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures* such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the Federal Constitution adequate to the exigencies of government and the preservation of the Union." (emphasis added)[6]

The intent of Congress in adopting the above resolution was quite clear and unambiguous: the authorization given to the Convention was strictly limited to revisions in the Articles of Confederation as needed and no more.

Thus citizens of 18th Century America who may have been concerned that the upcoming Convention in Philadelphia would become a runaway convention could reassure themselves against such an occurrence by pointing to several specific legal protections against just such an event. First, the congressional resolution which authorized the calling of the Convention clearly limited the agenda of that Convention. Moreover, that same resolution instructed the Convention to submit its "revisions" not only to Congress but also directly to the state legislatures, thus insuring that the legislatures would not be bypassed by the Convention in the amending process. Finally, of course, there were the protections afforded by the existing charter of the government itself, the Articles of Confederation, which would prevent any amendment that was not unanimously accepted by the legislatures of all thirteen states. Article XIII of the Articles of Confederation specifically stated,

> "And the Articles of this Confederation shall be inviably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; *unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.*" (emphasis added)[7]

Thus clearly bound by various legal limitations in its proper role, the Convention met in secret session through the Summer of 1787. On Monday, September 17, 1787, however, when the Philadelphia Convention finally adjourned, it became clear that none of these limitations had succeeded in binding the Convention to the ostensible purpose for which it had been called. Congress' resolution had clearly been violated. The Articles of Confederation had not been "revised" but had in fact been totally replaced by a proposed new Constitution which significantly enlarged the powers of the Federal government at the expense of the States. Moreover, the Convention was not going to submit the new Constitution for ratification to the State legislatures as the Congressional resolution and the Articles of Confederation required. Rather, it had adopted its own resolution which transmitted the document only to Congress with the recommendation that:

> "... it should afterwards be submitted to a *Convention of delegates,* chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification;" (emphasis added)[8]

Finally, the terms of Article XIII of the Articles of Confederation, which continued to be the legally binding and operative document of the government, had been totally ignored by the Convention's decision to treat the new Constitution as ratified when only nine states assented, rather than the unanimous thirteen required under existing law.

As noted above, the proceedings of the Convention had been conducted in secret. Thus, when the Constitution was sent to Congress on September 20 there was sharp comment that the Convention had so blatantly exceeded its authority. Even those who had been strongly in favor of a more effective national government had little reason to expect that such a comprehensive document would emerge from the Convention. Clearly, once convened, the political currents at work within the Convention simply became uncontrollable. Despite the existence of a series of legally binding protections against precisely this contingency, the Convention had run away, breaking the bounds which sought to restrain it.[9] Now Congress, which had specifically instructed the Convention not to do what it had so blatantly done, was caught in the political tides. In the face of a clear violation of the limitations contained in its Resolution calling the Convention, Congress simply acquiesced and transmitted the Convention's proposed Constitution to the States on September 28, 1787.

The first state to consider the Constitution, Delaware, promptly adopted it unanimously, as did New Jersey and Georgia, but in most other states the fights for ratification were vigorous and closely won. In Massachusetts, the final vote for adoption was 187-168; in New Hampshire it was 57-46; in New York, 30-27; in Virginia, 89-79; and in Pennsylvania, 46-23. Within nine months the Constitution had been ratified by all the states except Rhode Island and North Carolina, and on September 13, 1788, Congress, by resolution, recognized it.[10]

The document that emerged from the Philadelphia Convention has been praised by scholars and historians for its capacity to provide measures of both stability and flexibility. It is beyond question that it has, does and, hopefully, will continue to serve our Nation well. The American Constitution is a uniquely successful and enduring document in contemporary governments since it has the distinction of being the oldest written Constitution in continuous use as the governing charter of a nation.

Citizens To Protect The Constitution believes that it is precisely because it has served us so well that our nation should seek to preserve and protect the Constitution rather than place it at risk. History has established that the Philadelphia Convention was a success, but it cannot be denied that it broke every legal restraint which sought to limit its power and agenda. After the Convention, Madison himself acknowledged the violation of the Articles of Confederation by the Convention but attempted to justify this breach in the Federalist Papers:

> "It has been heretofore noted among the defects of the Confederation that in many of the states it had received no higher sanction than a mere legislative ratification. The principle of reciprocity seems to require, that its obligation on the other states should be reduced to the same standard. A compact between independent sovereigns founded on ordinary acts of legislative authority can pretend to no higher validity than a league or treaty by the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other, that a breach of one article is a breach of the whole treaty and that a breach committed by either of the parties absolves the others and authorizes them, if they please, to pronounce violated and void. *Should it unhappily be necessary to appeal to*

the delicate truce for a justification for dispensing with the consent of particular states to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the multiplied and important infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate. (emphasis added).[11]

If there is a lesson from Philadelphia it is certainly that a Convention is a singularly volatile forum which, once called, has the very real potential of running away with its mandate. This lesson should serve to give pause in any consideration of petitions calling for a Second Cconstitutional Convention. As Senator Charles McC. Mathias of Maryland has noted,

> "But if the remarkable and experienced men of the Constitutional Convention felt free to go beyond their appointed bounds, how can we be sure that any other group will respect the limits assigned to them when they meet in the heady atmosphere of the first Constitutional Convention in two centuries?"[12]

RTICLE V AT THE CONVENTION

One of the more striking aspects of the Philadelphia Convention's consideration of the proposed amending process to be incorporated in the new Constitution was the relatively minor attention which was devoted to this issue. Although the Convention had been meeting since May serious discussion of the method through which the new Constitution could be amended in the future did not occur until Monday, September 10.[13] Prior to that time the Convention had agreed, in principle, to a suggestion put forward by Virginia that the Congress should have no role in any future amending process incorporated in the new Constitution.

On that Monday, however, Mr. Gerry of Massachusetts moved to reconsider the proposed amending provisions as it had been previously reported by the Committee on Detail. What was eventually to become Article V of the Constitution was at that time Article XIX which read,

> "On the application of legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."[14]

Mr. Gerry expressed concern that, under this draft, Conventions would be called which would subvert state powers. Hamilton also expressed dissatisfaction with the current proposal but cited as his reasons, not the danger to state powers, but the danger to federal powers. He noted that state legislatures would not apply for "alterations" in the Constitution except to increase their own power at the expense of the federal government's authority.[15] Hamilton believed, therefore, that the National Legislature should also be able to amend the Constitution.

Madison agreed that the proposed amending Article needed more work and, perhaps prophetically, remarked, "on the vagueness of the terms 'call a convention for that purpose' as sufficient reason for reconsidering the Article. How is a Convention to be formed? By what rule decide? What the forces of its acts?"[16]

At that point Sherman of Connecticut made a motion to add language to the proposed Article XIX which would give the National Legislature a role in the amending process. His motion would have placed the following words at the end of Article XIX,

> "Or the Legislature may propose amendments to the several states for their approbation, but no amendments shall be binding until consented to by the several states."[17]

Before Mr. Sherman's motion could be voted on, however, Wilson of Pennsylvania pointed out that under this proposed language the unanimous consent of all the States would be required before a new amendment could be ratified. This was viewed as being overly restrictive of the amending process and the delegates agreed that only three-quarters of the States should be required to ratify a new amendment.

Madison then rose to put forward a comprehensive amending proposal which incorporated some of the ideas which had been under discussion,

> "The Legislature of the United States – whenever two-thirds of both Houses shall deem necessary or on the application of two-thirds of the legislatures of the several states shall propose amendments to the Constitution, which shall be valid for all intents and purposes as part thereof, when the same shall be ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-quarters thereof as one or the other mode of ratification may be proposed by the Legislature of the United States."[18]

The vote on Madison's version was 9-yes, 1-no, with one state delegation divided. It should be noted that under the Madison version there was no provision for a national Constitutional Convention. Amendments could only be proposed by the National Legislature. In this short discussion, therefore, the delegates had rapidly moved from the idea in the original draft of Article XIX, which was that only a Constitutional Convention could propose amendments, to accepting Madison's version which allowed only the Congress to do the actual proposing. The issue thus having apparently been disposed of, the Convention went on to discuss navigational concerns.

The question of the amending process continued to nag certain delegates however, and on Saturday, September 15, it was brought up again. Mr. Sherman of Connecticut complained that as presently constituted that procedure would allow three-quarters of the states to do things against the interests of the remaining states such as "abolishing them altogether."[19] This new problem with the amending process was making its appearance at the eleventh hour since this session was the last real working day of the Convention. In fact, the delegates remained in session that Saturday until 6:00 p.m. in order to finish the actual drafting of the document.[20] They would return on Monday only for final voting. It should be recalled that at this late hour the draft Constitution contained no provision for calling a Constitutional Convention since the Madison proposal had eliminated that possibility.

The issue of the amending process having been raised again George Mason of Virginia rose to condemn the present plan as "dangerous" since,

"As the proposing of amendments is in both the modes to depend in the first immediately and the second, ultimately on Congress, no amendments of the proper kind would ever be obtained by the people if the government should become oppressive."[22]

Morris and Gerry then moved to reintroduce the option of a Constitutional Convention by requiring that one be called if two-thirds of the states should petition for one. Madison stated that he had no particular objection but once again, as he had done only five days earlier when a convention was to be included in the amending process, he quickly expressed his misgivings about Conventions in general,

"That difficulties might arise as to the form, the quorum, etc., which in constitutional regulations ought to be as much as possibly avoided."[22]

Despite Madison's outspoken concerns that at the last minute they were incorporating a Convention device into the Constitution which was ill-defined, it was agreed to by the delegates.

Sherman rose once again to re-assert his complaint that the amending process the delegates had just agreed to did not protect the states from acts of future Conventions which might, for example, act to control the internal police powers of the states. Because of the lack of this protection from the actions of future Conventions, Sherman moved to do away with Article V altogether. The delegates voted 8-2, with one delegation divided, against Sherman's motion. Shortly thereafter, the delegates agreed, with no debate, to include a provision which would prevent future Constitutional amendments that would result in depriving the states of equal sufferage in the Senate. The consideration of Article V was thereby concluded.

Thus the entire procedure for amending the new Constitution was established in relatively short debates during two days in the closing hours of the Philadelphia Convention. Moreover, the discussion of the Constitutional Convention aspect of Article V was only a small part of that debate. The only real elaboration on what an Article V Convention would be like was Madison's warnings on both days of the unknowns surrounding such a forum. Perhaps it was the knowledge of how far the Constitutional Convention he was attending had strayed from its lawful boundaries which caused Madison concern over the possible excesses of future Conventions. Indeed, only a year after the Philadelphia Convention, Madison warned of the dangers which he believed would arise in the event of a Second Constitutional Convention. In a letter dated November 2, 1788, to George Lee Turberville, a member of the Virginia House of Delegates, Madison wrote,

"If a General Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress appointed to administer and support as well as to amend the system; it would consequently give greater agitation to the public mind; an election into it would be courted by the most violent partizans (sic) on both sides; it wd. probably consist of the most heterogeneous characters; would be the very focus of that flame which had already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberations of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance, I should tremble for the result of a Second. . . ."[23]

Clearly, of the branches of the federal government which the Philadelphia Convention established, this potential fourth branch was by far the least well-defined. As one commentator has noted:

"Consider the meager evidence shifted by these scholars, the history of Article V itself, as available in the records of the debate, the Federalist papers and the contemporary discussion of the new Constitution. These, I suggest, provide no plain answers to the question about scope and really do not offer good clues."[24]

On Monday, September 17, the delegates convened for the last time to formally adopt the document. There seemed to be a sense of relief that it was over. As one of the delegates noted,

"Major Jackson, Secretary, to carry it to the Congress – injunction of secrecy taken off. Members to be provided with printed copies – adjourned *sine die* – gentlemen of Convention dined together at the City Tavern."[25]

MUST CONGRESS CALL A CONVENTION?

Some of those who are most active in urging State legislatures to enact petitions calling for a Constitutional Convention to consider a balanced budget amendment insist that they do not actually want a Convention, but that they are simply attempting to put pressure on Congress to propose such an amendment to the states for ratification. As James Clark, a founder of the National Taxpayers' Union and one of those instrumental in the Convention drive has noted,

"This is just a way of getting attention – something akin to battling a mule with a board."[26]

Apparently this view is based on the premise that the Congress is simply refusing to consider this issue but that the threat of a Constitutional Convention will spur the Congress to avoid that possibility by passing a balanced budget amendment before 34 valid state petitions are actually received or, if 34 are received, then the Congress may properly act to nullify them at that time by proposing an amendment to the states.

At the outset it should be noted that Congress has not refused to consider a balanced budget amendment, but has in fact already acted on this issue. On August 4, 1982, the Senate narrowly passed a tax limitation, balanced budget constitutional amendment by the required two-thirds vote, but the amendment subsequently failed in the House by a vote of 236 to 187. Thus, it should be understood that this is not a situa-

tion where Congress has simply refused to consider a specific constitutional amendment and Article V is being used as a way of prodding it to do so. Rather, in this situation states continue to forward petitions for a Constitutional Convention on a balanced federal budget, not because they actually want a Convention, but ostensibly to pressure Congress into acting on that proposal. At the same time, however, Congress has in fact held hearings on such an amendment, debated its merits openly on the floor of each House and, after due deliberation, has rejected the proposal.

Citizens To Protect The Constitution would emphasize the view that for a state legislature to take the solemn step of formally calling for a Constitutional Convention while believing one will never actually be convened, or at least fervently hoping so, is certainly a particularly reckless form of constitutional roulette. The convening of a Constitutional Convention is, short of a declaration of war, the single most important act our government can undertake. It is certainly a step which should not be taken lightly or used merely as a method of "sending a message" to another branch of government. A state legislature would hardly be demonstrating that it was approaching the decision for a Convention with the requisite seriousness if it based its call for such a Convention on the hope that other states would not do so. As Representative Charles Bratkowski noted in the 1981 debate in the Missouri legislature concerning a petition for a Constitutional Convention,

> "This issue is of such profound importance to the survival of our Constitution that each state must give great thought and deliberation to the consequences of their act and each member should consider his or her vote as if their state is the 34th and final state to call for an unprecedented convention."

It should also be understood that the underlying premise of some petition advocates, that a Convention will somehow be avoided regardless of the number of petitions, is an assurance which should be met with considerable skepticism. If there is one area of agreement among constitutional scholars concerning Article V it is that once 34 valid petitions are received by the Congress, a Convention must be called. Alexander Hamilton emphasized this duty of Congress in 1788 when he wrote,

> "By the Fifth Article of the Plan the Congress will be obliged on the application of the legislatures of two-thirds of the states (which at present amounts to nine) to call a convention for proposing amendments, which shall be valid to all intents and purposes as part of the Constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof. The words of this article are preemptory. The Congress 'shall call a convention'. Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change, vanishes in air."[27]

There is virtually no ground in law or history for the belief that Congress could somehow vitiate the petitions, once they had reached the requisite number, by then passing some form of a balanced budget amendment. Contemporary constitutional scholars have maintained Hamilton's view of Congress' responsibility under Article V. As Professor Gerald Gunther of Stanford University Law School notes,

> "Moreover, one of the very few issues about the convention route on which scholars agree is that once 34 proper applications for a convention are submitted Congress is under a duty to call a convention and does not have a legitimate discretion to ignore the applications."[28]

Clearly, having Congress simply pass an amendment in lieu of convening a Constitutional Convention would not satisfy Article V since the two acts are not constitutionally equivalent. A Convention, for example, might after due deliberation decide not to propose such an amendment to the states. Additionally, it should be recalled from the history of Article V that the Philadelphia Convention specifically rejected a mode of amendment which would have allowed the adoption of an amendment simply upon the agreement of three-quarters of the states that one should exist.

Under Article V Congress' duty extends only to determining whether the states have submitted 34 valid petitions calling for a convention. While there is clearly some flexibility here for Congress to decide what exactly constitutes a valid Article V petition, and while some existing petitions may be excluded because of various flaws, the existence of the requisite number of valid petitions will inevitably result in a Convention. Moreover, the mere existence of 34 petitions, even though some may be ultimately found invalid, creates a real danger that Congress will begin to lose control of the situation. With 34 pieces of paper at hand some constitutional mechanism would become operative under Article V and place a burden on Congress to determine if the requisite number of valid petitions have, in fact, been received. If Congress simply refuses to act in this situation, it should not be unexpected that the courts would be asked to issue an injunction to force Congress to discharge its Article V duties.

Essentially, therefore, it should be remembered that the act of forwarding a petition to Congress by a state legislature has clear, definite, and because of the high number of existing petitions, somewhat immediate constitutional implications. *Citizens To Protect The Constitution* believes that legislators should not undertake decisions in this regard under the delusion that there will be no consequences resulting from the adoption of these petitions and that they are little more than general resolutions of sentiment. Assurances that a vote for such a petition would never result in a Convention are empty ones and a legislator's vote based on these assurances would be the equivalent of signing an affidavit with your fingers crossed: the signer may later complain that he or she did not mean it but the affidavit speaks for itself.

CAN STATES CONSTITUTIONALLY LIMIT THE AGENDA OF A CONVENTION TO LIMITATIONS PLACED IN THEIR PETITIONS?

Those favoring a Constitutional Convention seek to avoid concern over the specter of a runaway convention through statements that the states may surely and properly control the agenda of a Convention by limitations incorporated into the petitions they enact. The limitations to a certain subject matter, such as a balanced budget amendment, or for that matter even to a specific text of a proposed amendment, which are incorporated in various petitions now pending in Congress, are viewed both by Convention advocates and some scholars on the subject, as constitutionally acceptable and enforceable restrictions on the agenda of an Article V Convention. Professor William Van Alstyne of Duke University Law School, for example, supports the limited Convention theory as does a report on this subject prepared by the American Bar Association in 1974.[29] Professor Van Alstyne has written that:

> "It follows similarly that when 34 States do share a limited concern which they wished to have addressed in convention, and yet stand opposed to possible revisions to other portions of the Constitution with which they find no fault, they should equally be allowed to submit applications reflecting that view – with the expectation that Congress will respect the uniformity of their request."[30]

On the other hand there are a number of constitutional scholars who are equally certain that such a limited Convention was not contemplated by Article V and that such limitations in state petitions could therefore have no constitutional effect on a Convention. As with other questions concerning an Article V Constitutional Convention the only certainty appears to be the dangerous uncertainty which would surely confront us upon the convening of an actual Convention. Moreover, even Professor Van Alstyne acknowledges that Article V is at best vague concerning the details of such a Convention. In testimony before the Senate Subcommittee on the Constitution he noted the obvious ambiguities in the situation:

> "That such questions as there would indeed subsequently have to be resolved incidental to the effective use of this portion of Article V, moreover, was well understood. But their uncertainty, and the omission to provide for them in Article V itself, were not deemed sufficient reason either to abandon the provision in Article V or to outfit the Article with further details."[31]

Those who support the theory that a Convention's agenda cannot be limited by the states note that the record of the consideration of Article V at the Philadelphia Convention lends credence to the view that this forum was intended to be a national body capable of proposing amendments independent of state control. The states would continue to exercise the responsibility of ratifying amendments, but an Article V Convention could not be limited to the subject matter of the amendments it might propose. As Professor Walter Dellinger of the Duke Law School notes,

> "If the states could confine the Convention to a general subject, but not to a specific amendment, and the applying legislatures suggested different limitations then Congress would be forced to define and enforce limits on a Convention. Such action would conflict with a different aim of the drafters: the desire to create a mode of proposing amendments in which Congress played no significant role. In order to satisfy the various objectives of the framers a Convention must be free to define for itself the subject matter it will address; the state legislatures may call for such a Convention, but they should not be permitted to control it."[32]

Professor Gunther's study of the Philadelphia Convention's records on Article V leads him to a similar view:

> "To me, the most significant aspect of the debates on the amendment process in Philadelphia in 1787 was the deliberate introduction of the Convention device into Article V. That device makes the state initiated amendment route very different from the traditionally used alternative, whereby Congress proposes amendments and the states ratify. Under the Convention route, states cannot propose specific amendments and may only initiate a Convention; Congress must call a Convention when the requisite number of valid state applications are at hand; and, most important, it is the Convention that is the central body in formulating proposed amendments. The Convention mechanism is a compromise between centralist and localist forces. It was designed to still the fears of those who thought that state legislatures might have power to dictate the terms of proposed amendments on their own, without the intervention of a national deliberative body at the proposal stage."[33]

A review of the history of the deliberations on Article V discussed by this Report in the previous section would seem to lend at least some credence to this view. It might be recalled that efforts by Madison to have Congress alone control the power to propose amendments, either on its own initiative or when two-thirds of the States agreed on a specific amendment, were defeated in favor of two alternative proposing bodies: Congress and a state called National Convention. It could be argued that it would seem inconsistent for delegates who were about to conclude a very wide-ranging convention free of state controls to deliberately place that mechanism into the Constitution and then assume, without so stating, that this mechanism could be controlled by the states. Delegates to a Convention which, on its own authority, had developed a wide open agenda such as the Philadelphia Convention would certainly have specified the limitations they intended to place on the Convention referred to Article V if they intended that the Article V forum should be a different type of forum than the one they were just concluding.

Professor Charles Black of the Yale Law School notes that, in addition to the historical setting in which Article V was enacted, an analysis of the wording of that section of the Constitution leads him to the conclusion that a general Convention is the only type of forum authorized under Article V. Professor Black points out that the Article V wording authorizing a "Convention

for proposing amendments" clearly gives the states the power to call a general Convention "to propose amendments" to the Constitution. It does not, however, so clearly authorize the states to call a Convention for a narrow, limited purpose or agenda. Professor Black emphasizes that there are enormous differences between a general deliberative Convention and a single issue limited Convention. He notes that simply because Article V specifically authorizes a general Convention it should not be simply assumed that it also authorizes the states to convene a limited Convention:

> "Establishment of this crucial point quite changes the focus of inquiry. When we inquire now whether a state application for a limited convention asks for what Article V means, we are inquiring whether, in addition to its incontestably plain conferral on the legislatures of a very significant power, the power to force the call of a general constitutional convention, Article V is to be taken to give them, as well, a different power, not at all obviously meant by Article V. In an inquiry concerning correct amendment procedures, where, more than anywhere else, very clear legitimacy is requisite, I should think that great clarity of justification should be looked for before one adds, to plain meaning, another meaning far from plain."[34]

Moreover, Professor Black is of the opinion that since a limited Convention is not contemplated by Article V, state petitions calling for a Convention are a nullity and should therefor have no constitutional effect. He is particularly critical of those state petitions currently pending in Congress which actually contain the text of the amendment the state wishes a Convention to propose and thus seeks to limit the Convention's power not simply to a general subject matter but to the actual text incorporated in its petitions:

> "Assembling a convention for such a ministerial or rigorously channeled function is a bit of foolishness one can by no stretch of fancy think the Constitution calls for. It reminds me of Henry VIII's Conges d'elire which gave cathedral chapters the right to elect a bishop – namely the bishop designated by Henry VIII."[35]

Other scholars believe, however, that, while states may not constitutionally control a Convention once assembled, their petitions, while supposedly calling only for a limited Convention, do have constitutional effect and impose an obligation on Congress under Article V to include such petitions in determining the requisite two-thirds number. For example, Professor Gunther has stated that the limitation wording in the petitions can serve only as recommendations to the Convention but will have no legally binding effect.

Regardless of the ultimate resolution of the issues concerning the constitutional effect of these petitions, *Citizens To Protect The Constitution* believes that a review of the manner in which a number of our State legislatures have enacted them will reveal that this most important issue has been approached in an appallingly cavalier manner. As noted above, a government's calling for a Convention in order to review and perhaps modify the basic charter under which it has operated for 200 years can only be viewed as a most serious and solemn undertaking. Unfortunately, some legislatures view these petitions for a Constitutional Convention with no more seriousness than the non-binding myriad of resolutions and memorials which are passed every year on a variety of subjects, ranging from the state song to the exploits of the state university football team. In 1976, for example, the Pennsylvania Legislature enacted a petition requesting a Convention to consider a balanced budget amendment to the Constitution. Despite the gravity of such a step the petition passed with no hearings, and no recorded vote. Somewhat ironically this petition for a Constitutional Convention on a balanced federal budget was enacted immediately after a non-binding memorial asking the Congress to continue the federal government's financial aid to the states.[36] Indiana's petition calling for a Federal Constitutional Convention was sent to Congress in 1976 and appeared in the Congressional Record as having been duly adopted by the State Legislature. Two years later, however, it was discovered that the petition had in fact never been adopted by the Legislature and had been sent to Congress purely as a result of a clerical error.

Unfortunately, the Pennsylvania and Indiana experiences are by no means unique. Indeed out of the 32 state petitions currently pending, less than half of the legislatures have bothered to hold committee hearings on the actual effects of the petitions and the consequences of their enactment. Many states enacted their petitions with no recorded votes. As one study has noted,

> "Research conducted by Common Cause last year [1978] on the first 21 petitions passed by the States showed that in only six of them were committee reports issued explaining the proposed action; hearings where the public was allowed to testify were held in only six legislatures; and in two states no committees considered the petitions before they were passed by the two bodies of the legislature."[37]

As Professor Gunther has observed:

> "Most of the state legislatures that have adopted balanced budget constitutional convention resolutions have acted as if they were merely making a symbolic gesture, without fully realizing that they might be part of a triggering mass of 34 that would get a convention underway."[38]

The lack of attention to the potential constitutional consequences of these actions may not simply be an accident. Traditionally, it appears that those seeking Convention petitions do so in an unobtrusive way in order to maximize their probability of success by avoiding the difficult issues and questions surrounding the petitions. Simply put, some Convention proponents would rather ignore these issues by screening their activities from the close public scrutiny and debate which would naturally accompany such a significant proposal as one calling for the Second Constitutional Convention in the history of this country.

While this clandestine "backdoor" approach to convening an Article V Convention may be viewed as resoundingly successful by its backers, since it has resulted in 32 petitions, it hardly seems consistent with the tradition of open, deliberate and public decision-making which has developed in this country. It would indeed be ironic if in a country such as ours, where public discussion of a wide variety of political and social issues is rampant, the decision to convene a Convention with the potential power to change the Constitution could be made with practically no public debate and so little understanding of the enormous possible consequences. As Professor Dellinger has noted:

> "The limited convention is a form of special interest politics run rampant. It allows aggressive single issue fringe groups to engage in low visibility lobbying

through state legislatures for narrow proposals which then could be presented to a convention on a take-it-or-leave-it basis. I think the record of the Constitutional Convention indicates that a deliberative process is what was in mind and not one that was conducted by a plebiscite of state legislatures which lends itself to single interest politics which we have seen on the rise in this country."[39]

Citizens To Protect The Constitution would urge state legislatures to consider these petitions seriously and carefully, prior to their adoption. Moreover, in their deliberations state legislators should weigh the assurances that limiting language placed in a petition will surely prevent a runaway Convention against the belief of those scholars noted above that such limitations would carry no legally enforceable mechanism for controlling a Convention.

CAN CONGRESS CONSTITUTIONALLY LIMIT THE AGENDA OF A CONVENTION?

In addition to the assurances from some Convention advocates that the states may constitutionally limit the agenda of a Convention, these advocates have also sought to calm concerns by stating that the Congress itself may act as an enforcer of these limitations. In fact, legislation which would attempt to establish this "oversight" function has repeatedly been introduced in Congress but has not been enacted. In the current session, Senator Orrin Hatch has introduced S. 119, the *Constitutional Convention Implementations Act.* Similar bills have been introduced in the House. In the Senate version of the bill the "oversight" mechanism is contained in Sections 6, 10 and 11. Essentially, the bill calls for Congress, when the requisite number of states have submitted valid petitions, to pass a concurrent resolution which would "set forth the general subject of the amendment or amendments for the consideration of which the Convention is called." Section 10 of the bill specifically states that:

> "No convention called under this Act may propose any amendment or amendments of a general subject different from that stated in the concurrent resolution calling a Convention."

In addition, Section 11 seeks to grant a type of veto power to Congress in the event that the Convention violates its charter and submits amendments which were not contemplated in the original call for a Convention:

> "Within that period both Houses of the Congress may agree to a concurrent resolution stating that the Congress does not direct the submission of such proposed amendments to the states because such proposed amendment relates to or includes a general subject which differs from or was not included as one of the general subjects named or described in the concurrent resolution of the Congress by which the Convention was called."

There is some support for this view of congressional power over the Convention. The 1974 report of a committee of the American Bar Association, for example, expressed the opinion that Congress has such authority. However, it should be noted that this report's conclusion in this regard was in direct conflict to the finding by the ABA's own Section on Individual Rights and Responsibilities to the contrary that Congress has no such authority. Professor Van Alstyne of the Duke Law School also believes Congress may constitutionally control the final product of a Convention called to consider a single issue which then proposes amendments on other issues:

> "Insofar as, by some untoward event, that Convention – called for that purpose and under these auspices – were suddenly to run away with itself and instead produce an anti-abortion amendment, for example, so far from the exercise that brought it into being, and from the common understanding of those who brought it into being, that it would be entirely proper to reject that amendment on abortion. It so obviously non-germane to the auspices of the Convention otherwise properly assembled, it would be entirely proper for Congress to reject it."[40]

Once again, however, this view is not universally accepted and there is strong historical and legal opinion to the effect that the congressional role in the Convention process was intended by the Founders to be minimal, and that legislation passed by Congress in an attempt to establish such control over the Convention might therefore be found unconstitutional. A report on Constitutional Convention procedures legislation prepared by the New York County Lawyers Association, for example, points out:

> "However, the Constitutional provision (Article V) does not expressly require or even provide for implementing legislation. Indeed, the fact that it is not contained in Article I concerning the powers of Congress, may indicate that legislative implementation, apart from actually calling a constitutional convention in a proper case, is not contemplated."[41]

Professor Gunther of Stanford has also expressed doubts over such Congressional power:

> "In my view the text, history and structure of Article V make a congressional claim to play a substantial role in setting the agenda of the Convention highly questionable. If the state initiated method for amending the Constitution was designed for anything, it was designed to minimize the role of Congress. Congress was given only two responsibilities under that portion of Article V, and I believe that, properly construed, these are extremely narrow responsibilities. First, Congress must call the convention when 34 valid applications are at hand (and it is of course a necessary part of that task to consider the validity of the applications and to set up the machinery for convening the convention). Second, Congress has the responsibility for choosing a method of ratification once the convention submits its proposals. I am convinced that is all that Congress can properly do."[42]

It might be recalled from the previous discussion of the Philadelphia Convention's deliberations that under Madison's proposal for Article V there was no provision for a Convention. Congress was the only body which

could actually propose amendments to the Constitution. It could do so on its own or upon the application of two-thirds of the States, but Congress clearly was to command the central and sole role in proposing amendments to the Constitution. This aspect of Article V, however, was one of the issues which attracted criticism at the Philadelphia Convention and in fact precipitated the change in it. The final version of Article V retained Congress' ability to propose amendments but at the same time drastically reduced its role in responding to state initiatives for amendments by instituting a Constitutional Convention as a separate proposing body. It should be recalled that this was done partly in response to George Mason's objection that under the Madison proposal Congress was given too much power and that "no amendment of the proper kind would ever be obtained by the people if the government should become oppressive."[43]

A powerful argument might be made that, since the changes to Madison's proposal were intended to lessen the role of Congress and in a sense to circumvent a recalcitrant Congress, it would be suspect at best for Congress now to assert that it retained the authority to act as a supreme committee of absentee presiding officers of the Convention which could, in effect, rule issues beyond the subject matter of its call out of order. It should be recalled that Madison himself, who expressed serious doubts in Philadelphia concerning the wisdom of incorporating a Convention device in Article V, took a similar view in his letter to Turberville,

> "If a General Convention were to take place for the avowed and sole purpose of revising the Constitution it would naturally consider itself as having greater latitude than the Congress appointed to administer and support as well as to amend the system."[44]

As Professor Black has pointed out, Conventions were viewed by the Founders as the body most likely to be representative of the "people."[45] If the Founders held the authority of a Convention in this high regard, it is difficult to argue persuasively that an appropriately convened Article V National Convention could be constitutionally controlled by the National Legislature.

Once again an examination into the question of the Congressional power to control a Convention leads only to one firm conclusion: that scholarly and historical opinion on this issue is widely split and would surely lead to a divisive confrontation if a Convention were actually convened.

IMPLICATIONS OF A CONSTITUTIONAL CONVENTION

It should be emphasized that the dangers inherent in a Constitutional Convention are not only that it poses significant legal and constitutional questions, but that it would also raise issues of enormous political and social consequence. There can be little doubt that a Constitutional Convention called to consider a balanced budget amendment, for example, would present our domestic financial markets with a very unstable situation. Throughout the deliberations of the Convention, and during the ratification process if an amendment is actually proposed, our entire economy, both public and private sectors, would find it extremely difficult to make long-range decisions because of the possibility of a radically reformed taxing and spending policy on the part of the federal government.* As Secretary of the Treasury Donald T. Regan noted:

> "This thing could suddenly jump on us. It would certainly cause a lot of confusion – a constitutional convention in 1984, a presidential election year."[46]

In addition to the confusion in our domestic economic markets the entire world economy would be impacted by the mere existence of the Convention. America's leading role in the world economy would, of course, mean that instability and confusion at home would reverberate around the globe. This would be particularly true in areas where American foreign aid and assistance is being used to help stabilize an otherwise unstable situation. In his letter to Turberville, Madison commented on the disruptive effects an American Constitutional Convention would have in other parts of the world:

> "It is not unworthy of consideration that the prospect of a second Convention would be viewed by all Europe as a dark and threatening cloud ranging over the Constitution just established and perhaps over the Union itself."[47]

It should be noted that the position and influence of the United States in Madison's world was far less than it is in the latter stages of the Twentieth Century, which in turn means that the foreign discord and disruption he predicted in 1788 would be greatly compounded today.

Added to the economic confusion at home, and to the discord in foreign countries, would be the domestic social and political unrest naturally associated with such a significant event as the Second Constitutional Convention

*Although this report concerns itself primarily with the efficacy of a Convention to amend the Constitution, rather than the efficacy of the balanced budget amendment itself, it might be noted that a significant portion of the American business community, while supporting fiscal restraint on the part of the federal government, does not support a constitutional amendment as the best method of accomplishing this goal. A recent report by the Research and Policy Committee of the Committee for Economic Development, whose 200 trustees are presidents or board chairmen of major American corporations as well as presidents of major universities, concluded: "We are opposed to a constitutional amendment to balance the federal budget or place other specific limitations on budget outcomes. In our judgment, a constitutional amendment would be unworkable and would be likely to do more harm than good." *See* "Strengthening The Federal Budget Process: A Requirement For Effective Fiscal Control," *A Statement By The Research and Policy Committee of The Committee For Economic Development*, June 28, 1983.

in the history of this nation. *Citizens To Protect The Constitution* believes that it is not in the best interest of our society to intentionally embark on a course which will naturally produce such turmoil as a consequence. As Professor Lawrence Tribe of Harvard Law School has noted:

> "Particularly in a period of recovery from a decade ruptured by war, political assassination, near impeachment and economic upheaval, and particularly in a time when such recovery has already been interrupted by new domestic and international crises, it is vital that the means we choose for amending the Constitution be generally understood and, above all, widely accepted as legitimate. An Article V convention, however, would today provoke controversy and debate unparalleled in recent constitutional history. For the device is shrouded in legal mysteries of the most fundamental sort, mysteries yielding to no ready mechanism of resolution."[48]

Professor Tribe believes that even if the myriad legal questions surrounding the Convention are ultimately resolved, at the very least they will involve domestic political confrontations of "nightmarish dimensions" between Congress and the Convention, between Congress and the Supreme Court, and between the Supreme Court and the States.

In a very real sense, convening an Article V Convention instantly creates a fourth branch of the federal government. Convention advocates who are quick to assure that this new entity would pose no problem in terms of the balance of power with the three permanent branches seem to be studiously avoiding the 200-year constitutional history of this country. The shifting power among the three traditional branches throughout these two hundred years, even though their respective powers are more clearly delineated in the Constitution and despite the fact that there has been significant practice and tradition surrounding the development of their jurisdiction, has been a constant theme in our history. Indeed, the ultimate resolution of the questions surrounding the checks and balances among the three branches have not to date been answered, and in fact may never be resolved. Throughout our history one or another branch of government has sought to assert its authority over the other branches. The previous session of Congress provides a very recent illustration. By May of 1981 in the 97th Congress 23 bills had been introduced in the House and 4 in the Senate which sought to extend Congressional control over the jurisdiction of the Supreme Court."[49]

In addition, through the late Summer and early Autumn of 1982 the entire Senate engaged in lengthy and heated debate concerning whether that body possessed the requisite constitutional power over the jurisdiction of the Federal Courts to prevent the judicial branch of government from hearing "voluntary" school prayer cases."[50] Surely to state that a suddenly activated fourth branch of government, whose powers are undefined by either tradition or the Constitution, would not come into rapid conflict with the existing three branches is to whistle loudly past a rather large graveyard. The three branches which have been in existence for almost two centuries continue to this day to disagree sharply about their respective powers.

Advocates of a National Constitutional Convention have occasionally cited state constitutional conventions as precedent for the proposition that these forums can easily be limited in their scope and agenda. Those who have had some experience in this area, however, are less certain. The noted author James Michener once served as Secretary to the Pennsylvania State Constitutional Convention which met under specific legislative instructions that it could not consider the issues of state income tax, terms of the governor, or state aid to parochial schools. While noting that history is filled with examples of conventions assembled for one purpose which then lurch in unforeseen directions, Mr. Michener observed:

> "My personal experience in this field is relevant. I have explained how carefully the Pennsylvania Legislature spelled out the limits within which the Pennsylvania Constitutional Convention must act, and since we stayed within those limits it would seem that this proved the efficacy of that system of policing a convention. Quite the contrary. As Secretary of the Convention, I became aware of the intense pressure on some members to break out of the limits, thus arbitrarily set. Again and again we ran up to the margins of our Commission like little boys playing at the edge of a bonfire, and with a bad break we could have destroyed the entire procedure."[51]

As noted previously, there is only one precisely relevant example of a Convention which clearly violated both the governing document of the time concerning the method of amendment as well as Congress' specific subject matter limitation in its resolutions calling for the Convention. As we have seen, despite the fact that the Philadelphia Convention clearly could not lawfully do what it ultimately did, neither the Articles of the Confederation nor Congress' limitations could stop the political forces at work. The existing law of the land was simply swept up in the dynamics of the situation and the carefully structured protections of the

Congress and the Articles of Confederation were unable to control the actions of a Convention which clearly exceeded its authority.

The experience at Philadelphia demonstrates that, unlike the present situation with Article V where the legal questions are largely unanswered, even where the restraints are clear and acknowledged, as they were in 1787, a Convention may easily stray from its original authority. Professor Gunther outlined a possible course of events in his testimony before the Seante Constitution Subcommittee:

> "Suppose Congress were to specify a subject in its call, were to enact an exhortation that a convention should address only that particular subject. The next step would be the selection of delegates to a convention. The convention delegates would probably be chosen in popular elections, where passions and delegates would be hostile to congressional control, where issues other than the specified ones would no doubt be raised, and where some successful candidates would respond to these pressures. I believe that when the elected delegates gather at the convention they could legitimately speak as representatives of the people, chosen at the most recent nationwide election. Those delegates could make the justifiable argument that they were charged with considering all these constitutional issues perceived as of significance by the people who elected them – essentially that the convention was entitled to set its own agenda. The convention accordingly might propose a number of amendments going beyond the subject mentioned in the call. Under the (Constitutional Convention Implementation) bills before you, Congress could veto such 'unauthorized' proposals, could refuse to submit such convention proposals to the states for ratificaiton. But I believe that that kind of congressional veto effort would encounter not only substantial constitutional arguments but also substantial political restraints."[52]

CONCLUSIO

Citizens To Protect The Constitution believes that the convening of a Second National Constitutional Convention would constitute a reckless use of a constitutional device which is little understood and has never been employed in our entire history. As we have noted in this Report, assurances that such a Convention will not consider issues other than that for which it has been convened should be weighed against the considerable legal, historical and practical evidence to the contrary. Moreover, the mere existence of a Second Constitutional Convention in the history of this Nation will invariably result in unnecessary social, political and economic unrest both at home and abroad.

We should note that it is not the position of *Citizens To Protect The Constitution* that the Convention device placed in Article V by the Founders should never be employed under any circumstances. A Convention would certainly be appropriate under the extreme conditions which Mr. Mason cited when he suggested that such an option be placed in Article V: when the government has become oppressive. There are several devices found in the Constitution which are wisely placed there to handle the extraordinary case and the unusual circumstances, but they are not designed to be employed in the ordinary course of business of the government. Presidents should not be impeached because a faction disagrees with their policies, nor should judges be removed from the bench because we dislike their decisions in a case. These issues are properly fought out in elections and appeals rather than employing the more extreme remedies found in the Constitution. Likewise, the infinitely more significant step of convening a National Constitutional Convention should only be resorted to under the most severe circumstances.

The Congress of the United States had considered and rejected a proposed balanced budget amendment to the Constitution. The traditional course for those who disagree with this position is to elect a Congress which would pass such an amendment. Nationwide federal elections are conducted every two years and the issue of a balanced budget amendment has been widely and actively debated for some time by virtually every candidate for Federal public office. This free and open election process continues, of course, to be available and it is in this forum that those who favor such an amendment should present their case to the voters. There is simply no need to resort to the most extreme step available in the entire Constitution: a Second Constitutional Convention. *Citizens To Protect The Constitution* would agree with the views of James Madison, one of the most influential delegates to the first Convention in Philadelphia, that we should "tremble for the results of a Second."[53]

FOOTNOTES

1. Smith, P., *The Shaping of America,* Vol. 3, p. 50 (1980).
2. Bowen, C. D., *Miracle at Philadelphia,* p. 9 (1966).
3. Flexner, J. T., *George Washington and The New Nation* (1783-1793) p. 90 (1969).
4. *Id.*
5. Bowen, C. D., *supra,* at 9.
6. *Id.,* at 678.
7. "Articles of Confederation," *United States Code Service, Constitution,* Lawyers Co-Operative Publishing Co., p. 11 (1977).
8. *The Constitution of the United States of America,* U.S. Government Printing Office, Washington, D.C., p. 22 (1972).
9. Warren, E., *A Republic, If You Keep It,* p. 27 (1972).
10. *Id.,* at 29.
11. Madison, James, *The Federalist Papers,* No. 43, January 23, 1978.
12. Mathias, Senator Charles, "What's The Constitution Among Friends," 67 *American Bar Association Journal,* p. 861, July 1981.
13. Farrand, M., ed., *The Records of the Federal Convention of 1787* II (1937), p. 557.
14. *Id.,* p. 557.
15. *Id.,* p. 558.
16. *Id.,* p. 558.
17. *Id.,* p. 558.
18. *Id.,* p. 559.
19. *Id.,* p. 629.
20. Farrand, M., *The Framing of the Constitution of the United States,* Yale University Press, p. 191 (1913).
21. II, Farrand, M., ed. p. 629.
22. *Id.,* p. 630.
23. Rutland, R., ed., *The Papers of James Madison,* Vol. 11, U. of Va. Press (1977), p. 331.
24. "Good Intentions, New Inventions, and Article V Constitutional Conventions", 58 *Texas L. Rev.* 131 at 148, December 1979.
25. II, Farrand, M., ed., p. 650.
26. *Baltimore Evening Sun,* March 11, 1983.
27. Hamilton, Alexander ,*The Federalist Papers,* No. 85, May 28, 1788.
28. Gunther, Gerald, "The Convention Method of Amending The United States Constitution" 14 *Georgia Law Review 1,* Fall 1979.
29. "Amendment of The Constitution by The Convention Method Under Article V." *Report of the Special Constitutional Convention Study Committee of the American Bar Association,* Chicago, Illinois (1974).
30. Prepared Statement of Professor William W. Van Alstyne before the United States Senate Subcommittee on The Constitution, November 29, 1979.
31. *Id.*
32. Dellinger, Walter, "The Recurring Question of the 'Limited' Constitutional Convention" 88 *Yale Law Journal* 1623 (1979).
33. Prepared Statement of Professor Gerald Gunther before The United States Senate Subcommittee on The Constitution, November 29, 1979.
34. Letter From Professor Charles L. Black, Jr., to the Honorable Edward Kennedy, Chairman, Senate Judiciary Committee, June 1, 1979.
35. *Id.*
36. 1976 History of House Resolutions Serial No. 235, Resolution No. 235.
37. "Implications of Constitutional Convention Treated Casually by Legislatures", *Common Cause Editorial Memorandum,* Washington, D.C., February 1979, p. 4.
38. Gunther, 14 *Georgia L. Review 1* (1979).
39. Testimony of Professor Walter Dellinger before the United States Senate Subcommittee on The Constitution, November 29, 1979.
40. Testimony of Professor William Van Alstyne before the United States Senate Subcommittee on The Constitution, November 29, 1979.
41. "Report on The Proposed Constitutional Convention Procedures Act", *New York County Lawyers Association Committee on Federal Legislation,* Report No. F-7, June 1979.
42. Gunther, Gerald, 14 *Georgia Law Review 1* (1979).
43. II Farrand, p. 629.
44. Rutland, R., ed., p. 330.
45. Letter from Professor Charles L. Black, Jr. to the Honorable Edward Kennedy, Chairman, United States Senate Committee on The Judiciary, June 1, 1979.
46. *Christian Science Monitor,* June 23, 1983.
47. Rutland, R., ed., p. 330.
48. Prepared Statement of Professor Laurence H. Tribe, submitted to the United States Senate Subcommittee on the Constitution, November 29, 1979.
49. Gunther, Gerald, *Cases and Materials on Constitutional Law,* 10th edition, 1982 Supplement, p. 1.
50. *1982 Congressional Quarterly Almanac,* Congressional Quarterly, Inc., Washington, D.C.
51. Prepared Statement of James A. Michener, Submitted to the United States Senate Subcommittee on The Constitution, November 29, 1979.
52. Testimony of Professor Gerald Gunther, before the United States Subcommittee on the Constitution, November 29, 1979.
53. Rutland, R., ed., p. 330.

APPENDIX

LAW PANEL

T. Alexander Aleinikoff
University of Michigan Law School
Florian Bartosic, Dean
University of California at Davis, School of Law
C. Christopher Brown
University of Maryland, School of Law
Neil H. Cogan
Southern Methodist University, School of Law
Walter E. Dellinger
Duke University School of Law
Thomas I. Emerson
Yale Law School
Jefferson B. Fordham
University of Utah, College of Law
Gerald Gunther
Stanford Law School
Betsy Levin, Dean
University of Colorado, School of Law
Arval A. Morris
University of Washington, School of Law
Terrance Sandalow, Dean
University of Michigan Law School
Robert L. Schwartz
University of New Mexico, School of Law
Laurence H. Tribe
Harvard University Law School

Institutional affiliations are provided only for purposes of identification.

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Tyler Professor of Constitutional Law

GRISWOLD HALL 307
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

The primary threat posed by an Article V Convention is that of a confrontation between Congress and such a Convention. Upon Congress devolves the duty of calling a Convention on application of the legislatures of two-thirds of the states, and approving and transmitting to the states for ratification the text of any amendment or amendments agreed upon by the convention. The discretion with which Congress may discharge this duty is pregnant with danger even under the most salutary conditions.

In the event of a dispute between Congress and the Convention over the congressional role in permitting the Convention to proceed, the Supreme Court would almost certainly be asked to serve as referee. Because the Court might feel obliged to protect the interests of the states in the amendment process, it cannot be assumed that the Court would automatically decline to become involved on the ground that the dispute raised a nonjusticiable political question, even if Congress sought to delegate resolution of such a dispute to itself. Depending upon the political strength of the parties to the dispute, a decision to abstain would amount to a judgment for one side or the other. Like an official judgment on the merits, such a practical resolution of the controversy would leave the Court an enemy either of Congress or of the Convention and the states that brought it into being.

A decision upholding against challenge by one or more states an action taken by Congress under Article V would be poorly received by the states involved. Truly disastrous, however, would be any result of a confrontation between the Supreme Court and the states over the validity of an amendment proposed by their Convention. Yet the convention process could, quite imaginably, give rise to judicial challenges that would cast the states into just such a conflict with the Supreme Court -- despite congressional attempts to exclude such disputes from the Court's purview.

At a minimum, therefore, the federal judiciary, including the Supreme Court, will have to resolve the inevitable disputes over which branch and level of government may be entrusted to decide each of the many questions left open by Article V.

The only possible way to circumvent the problematic prospect of such judicial resolution is to avoid use of the Convention device altogether until its reach has been authoritatively clarified in the only manner that could yield definitive answers without embroiling the federal judiciary in the quest: through an amendment to Article V itself.

STANFORD LAW SCHOOL

Personal Statement, Professor Gerald Gunther

My major concern is with constitutional processes. The convention method of amending the Constitution is a legitimate one under Article V: it is an appropriate method for proposing amendments when two-thirds of the state legislatures, with appropriate awareness of and deliberation about the uncertainties and risks of the convention route, choose to apply to Congress to call a convention. But the ongoing balanced budget convention campaign has not been a responsible invocation of that method. Instead, between 1976 and 1979, about half of the state legislatures adopted applications without any serious attention to the method they were using, in an atmosphere permeated with wholly unfounded assurances by those who lobbied for the convention route that a constitutional convention could easily and effectively be limited to consideration of a single issue, the budget issue. In my view, a convention cannot be effectively limited. But whether or not I am right, it is entirely clear that we have never tried the convention route, that scholars are divided about what, if any, limitations can be imposed on a convention, and that the assurances about the ease with which a single issue convention can be had are unsupportable assurances.

I find it impossible to believe that it is deliberate, conscientious constitution-making to engage in a process that began in 1976 with a mix of inattention, ignorance and narrow, single-issue focus; that might well expand to a broader focus during the campaigns for electing convention delegates; and that would not blossom fully into a potentially broad constitutional revision process until the convention delegates are elected and meet. There is no denying the fact that, if the present balanced budget convention campaign succeeds in eliciting the necessary applications from 34 state legislatures, the convention call will be triggered by inadequately considered state applications, for the vast preponderance of the legislative applications rest on an entire absence of consideration of the risks of a convention route. In my view, that constitutes a palpable misuse of the Article V convention process. The convention route, as I have said, is legitimate when deliberately and knowingly invoked. The ongoing campaign, by contrast, has produced a situation where inattentive, ignorant, at times cynically manipulated state legislative action threatens to trigger a congressional convention call. I cannot support so irresponsible an invocation of constitutional processes.

Gerald Gunther,
William Nelson Cromwell Professor of Law

Crown Quadrangle
Stanford California
94305

Gerald Gunther
Nov. 17, 1983

UNIVERSITY OF MARYLAND SCHOOL OF LAW
500 WEST BALTIMORE STREET • BALTIMORE, MARYLAND 21201

STATEMENT OF PROFESSOR CHRISTOPHER BROWN

The most alarming aspect of the fact that 32 of the necessary 34 states have called for a constitutional convention is the threat this development poses to a system that has worked so well for nearly 200 years. We are on the brink of encountering the risks of radical surgery at a time when the patient is showing no unusual signs of difficulty. If this country were faced with an uncontrollable constitutional crisis, such risks might be necessary; but surely they have no place in the relatively placid state of present day constitutional affairs. Now is not the time for the intrusion of a fourth unknown power into our tripartite system of government.

After 34 states have issued their call, Congress must call "a convention for proposing amendments." In my view the plurality of "amendments" opens the door to constitutional change far beyond merely requiring a balanced federal budget. The appropriate scope of a convention's agenda is but one of numerous uncertainties now looming on the horizon: Need petitions be uniform, limited or general? By whom and in what proportion are the delegates to be chosen? Who will finance the convention? What role could the judiciary play in resolving these problems? The resolution of these issues would inevitably embroil the government in prolonged discord.

Assembling a convention and thereby encountering and attempting to resolve these questions would surely have a major effect upon the ongoing operations of our government. Unlike the threats posed by Richard Nixon's near impeachment, the convening of a convention could not necessarily be compromised to avoid disaster. It would surely create a major distraction to ordinary concerns, imposing a disabling effect on this country's domestic and foreign policies. Only the existence of an actual breakdown in our existing governing structure warrants such a risk-prone tinkering with our constitutional underpinnings. Now is not the time to take such chances.

December 2, 1983

Statement of Professor Neil H. Cogan

I agree almost entirely with the foregoing memorandum.

My understanding of the Federal Convention is that it is a general convention; that neither the Congress nor the States may limit the amendments to be considered and proposed by the Convention; that the Convention may be controlled in subject matter only by itself and by the people, the latter through the ratification process. My understanding is further that the States and Congress may suggest amendments and the people give instructions, but that such suggestions and instructions are not binding. Thus, I believe that should the Congress receive thirty-four applications that clearly and convincingly are read as applications for a general convention (whether or not accompanied by suggested amendments), then Congress must call a Federal Convention.

While it is plainly appropriate to examine the traditional historical sources -- text, debates, papers and pamphlets, correspondence and diaries -- it is plain too that these sources must be examined, and other sources chosen, within the context of our evolving theory of government. As I understand that theory, the Federal Convention is the people by delegates assembled, convened to consider and possibly propose changes in our fundamental structures and relationships -- indeed, in our theory of government itself --, and controlled only by the people and certainly not by other bodies the tasks and views of which may disqualify them from fundamental change and which themselves may be the subjects and objects of fundamental change.

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

THE UNIVERSITY OF UTAH

COLLEGE OF LAW
SALT LAKE CITY, UTAH 84112

November 29, 1983

I here offer brief comments of my own. The proponents are trying to blend the two methods of constitutional change made available by Article Five. They are saying that they do not trust a convention, so they propose to resort to such a body. That is incongruous. They may not have it both ways.

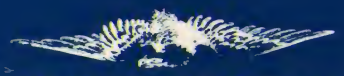
It is to be noted that in the American tradition a constitutional convention is not a constituent assembly -- a body competent both to draft and to adopt a constitution. In such an assembly is reposed sovereignty. The state antecedents of the Federal Constitution of 1787 all contemplated voter ratification. In this context it is not unreasonable to conclude that the members of the 1787 federal convention perceived such a convention to be competent to have the widest range of action in proposing amendments. Of course the very text confirms this by use of the plural "amendments." A convention might propose a single amendment but it would clearly have a wider range.

If what proponents desire is a particular change, the state legislative initiation method is adapted to the purpose. If more general review and possible changes are contemplated the convention method is plainly indicated.

Jefferson B. Fordham

". . . having witnessed the difficulties and dangers experienced by the first Convention, which assembled under every propitious circumstance, I would tremble for the result of a Second."

—James Madison



Citizens To Protect The Constitution

1900 L Street, N.W.
Suite 610
Washington, D.C. 20036

(202) 785-2936